

**MURIN PERERA
vs
GAJAWEERA**

COURT OF APPEAL
WIMALACHANDRA, J.,
C. A. L. A. No. 161/2003
D. C. COLOMBO 20512/99D
JULY 29, 2004

*Civil Procedure Code, sections 151, 165 and 166 – Recalling of a witness -
Evidence Ordinance? section 138 (4) - What factors should be considered -
What is malicious desertion? – Animus discerendi.*

The plaintiff-appellant instituted action for a divorce on the ground of malicious desertion. The defendant -respondent, while seeking the dismissal of the plaintiff's action sought a divorce on the ground of malicious desertion of the plaintiff -appellant.

After the plaintiff-appellant concluded his case, the defendant-respondent commenced giving evidence. Whilst he was giving evidence, the plaintiff-appellant indicated to Court that she possesses evidence that the defendant-respondent had married another person in December 2002, and in the circumstances sought permission of Court to re-cross examine the defendant-respondent in terms of Section 166/165. This was refused on the basis that plaintiff-appellant filed action for divorce on the ground of malicious desertion and that the defendant-respondent had contracted the second marriage after filing of the action and that the right of parties would be decided as at the date of institution of the action.

Held :

Per Wimalachandra, J.,

"If a party satisfies court that any evidence which is vital for that party to establish his case was not within his knowledge at the time his opponent was giving evidence or when that party was leading evidence, in my view it is a matter which falls within the ambit of Sections 165 and 166; it is my view that there are valid reasons for the court to exercise its discretion to allow the applicant's application to re-cross examine the defendant-respondent under Sections 165 and 166, *purely* for the purpose of eliciting the truth of the matter in that whether the defendant – respondent left the matrimonial home with *animus discerendi*".

- (i) The desertion must be malicious. A mere departure is not malicious. It must be established that the spouse left the matrimonial home with the intention of never returning;
- (ii) The plaintiff-appellant should be allowed to re-cross examine the defendant-respondent to establish that he had contracted a second marriage with the fixed intention of terminating the existing marriage, and thereby not rejoining the plaintiff in the common matrimonial home.

APPLICATION for leave to appeal from an order of the District Court of Colombo, with leave being granted.

Cases referred to :

1. *Ramalingam vs Ramalingam et al* - 35 NLR 174
2. *R vs Pin Hamy* - 51 NLR 169

Faizer Musthapha with Sanjeewa Kaluarachchi for plaintiff petitioners.

Dilshan Jayasooriya with Chanke Manawadu for defendant respondent.

Cur.adv.vult

November 5, 2004

WIMALACHANDRA, J.

This is an appeal from the order of the Additional District Judge of Colombo dated 06. 05. 2003. Leave to Appeal was granted by this Court by Order dated 25. 11. 2003.

Briefly, the facts as set out in the petition are as follows:

The plaintiff - appelleant (Appellant) instituted an action in the District Court of Colombo against the defendant - respondent (respondent) *Inter alia* for a divorce on the grounds of malicious desertion of the respondent, for the physical and legal custody of the child by the said marriage and permanent alimony of Rs. 500,000/- for the appellant, and for the maintenance of the child. The respondent filed his answer on 18. 01. 2001 praying *inter alia* for the dismissal of the plaintiff's action, for a divorce on the grounds of malicious desertion of the appellant and for the physical and legal custody of the child from the said marriage.

The trial commenced on 04. 07. 2001 by recording admissions and issues. The plaintiff gave evidence on 27. 08. 2002 and his evidence was concluded on the same day. The respondent commenced giving evidence on 27. 08. 2002 and further trial was postponed for 26. 03. 2003. On that day the learned counsel for the appellant submitted to Court that the appellant possessed evidence to the effect that the respondent had married another woman in December 2002 and that he also possessed the necessary documents in respect of the respondent's second marriage while the present marriage is existing. Accordingly, the appellant sought the permission of Court to re-cross examine the respondent in terms of sections 165 and 166 the Civil Procedure Code and under section 138(4) of the Evidence Ordinance.

The learned counsel for the respondent objected to this application for the reason that the appellant had filed this action for divorce against the respondent on the ground of malicious desertion and not on adultery. The

learned Additional District Judge by order dated 06. 05. 2003 refused the application made on behalf of the appellant. The learned Judge refused the application for the reasons that the appellant had filed the action for divorce against the respondent only on the ground of malicious desertion and that the respondent contracted the second marriage after the filing of this action and that the rights of the parties would be decided as at the date of institution of the action.

Section 165 of the Civil Procedure Code permits the Court to use its discretion and recall any witness, whose testimony has been taken, for further examination or cross examination, whenever in the course of the trial if the Court thinks it necessary for the ends of justice to do so.

Section 166 states that, "the Court may for grave cause to be recorded by it at the time, permit a departure from the course of trial prescribed in the foregoing rules." The foregoing rules referred to in section 166 are the rules contained in sections 146 - 165.

The Court is permitted to depart from the procedure laid down in sections 151 to 165 for valid reasons only.

The appellant instituted this action for divorce *vinculo matrimonii* against respondent on the ground of malicious desertion and for custody of the child. It is settled law that simple desertion is not sufficient to entitle a plaintiff to claim a divorce. The desertion must be malicious. A mere departure from the matrimonial home is not sufficient. It must be established that the spouse left matrimonial home with the intention of never returning.

It was held in the case of *Ramalingam vs. Ramalingam*⁽¹⁾ that the term malicious desertion implies deliberate, wholly unreasonable, definite, and final repudiation of the marriage state.

The learned counsel for the appellant submitted that the appellant was possessed with the evidence that the respondent had married another woman only after the respondent had given evidence and as such the appellant wanted to re-cross-examine the respondent and lead evidence to establish that he is married to another woman. The appellant had made this application not to establish that the respondent is living in adultery, but to show that he had left the matrimonial home with the intention of never returning as he had now married another woman.

Sections 165 and 166 stipulate the circumstances under which the Court may allow to call further evidence or to re crossd examine a witness to see that trials are fairly conducted and to ascertain the truth to arrive at the correct decision.

If a party satisfies the Court that any evidence which is vital for that party to establish his case was not within his knowledge at the time his opponent was giving evidence or when that party was leading evidence, in my view it is a matter which falls within the ambit of sections 165 and 166. Accordingly, in the instant case, it is my view that there are valid reasons for the Court to exercise it's discretion to allow the appellant's application to re - cross examine the respondent under sections 165 and 166 purely for the purpose of eliciting the truth of the matter, in that whether the respondent left the matrimonial home with *animus discerendi*.

Similarly section 138 (d) permits the Court to recall a witness either for further examination in chief or further cross examination.

Usually the Court allows an application made under section 138 (d) only if the party making the application gives satisfactory reasons. In the case of *R. Vs. Pinhamy* ⁽²⁾ Basnayake, A. C. J. observed that, a party asking for the recall of a witness must indicate to the judge why he wants the witness recalled, and satisfy the judge that it is necessary for the just decision of the case.

In the instant case, the appellant wanted ro re-cross-examine the respondent to show that the respondent left the matrimonial home with the fixed intention of terminating the marriage. At the time of making the application to re-cross-examine the respondent the appellant indicated to Court that he possessed evidence which was not available to him at the time the respondent was cross examined, to show that the respondent had contracted a second marriage and thereby to establish malicious desertion which requires not only the *factum* of desertion but also the required *animus* to repudiate the marital relationship with the appellant. Since the appellant had come to know that the respondent had contracted a second marriage only after the conclusion of the examination of the respondent, the applicaion made by the appellant to elicit the fact of the respondent's second marriage is in any opionion necessary for the just decision of the case. What is important is to find out the truth, and to do

justice according to law. In this action the question before the learned judge is to determine whether the respondent left the matrimonial home with the fixed intention of terminating the marriage. That is, whether he left the matrimonial home with the intention of not rejoining the plaintiff in the common household.

In these circumstances it is my considered view that the learned District Judge should have allowed the application made by the appellant to re-cross-examine the respondent to establish that he had contracted a second marriage with the fixed intention of terminating the existing marriage and thereby not rejoining the plaintiff in the common matrimonial home.

For these reasons I would allow the appeal and set aside the order made by the learned Judge dated 06. 05. 2003. The learned District Judge is directed to allow the appellant to re-cross-examine the respondent with regard to the *animus* to repudiate the marriage to the appellant by contracting a second marriage. In all the circumstances of this case I order no costs.

Appeal allowed.
